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via email and first-class mail
Ms. Susan Gray
c/o Office of the Director of State Courts
P.O. Box 1688
Madison, WI 53701-1688

Re: Comments on Petition for Supreme Court Rule 07-09

Dear Ms. Gray:

The Justice Department is pleased to provide comments on Petition for Supreme Court Rule 07-09 ("the petition"), in which the Board of Governors of the State Bar of Wisconsin ("State Bar") requests that the Wisconsin Supreme Court create a new rule to define the practice of law (the "proposed definition"), and create a system to administer that rule. If adopted, the proposed definition would bar non-lawyers from competing with lawyers for a range of services and could unnecessarily increase the prices paid by Wisconsinites for those services.[1]

Consumers generally benefit from competition between lawyers and non-lawyers. Accordingly, the Justice Department believes that the definition of the practice of law should be limited to activities for which specialized legal knowledge and training is demonstrably necessary to protect the interests of consumers in circumstances where consumers are not equipped to recognize the need for such knowledge and training. We are concerned that the petition, by defining the practice of law in broad terms to include "[g]iving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration" and "negotiati[ng] . . . legal rights or responsibilities on behalf of another entity or person(s),"[2] will unduly restrict non-lawyers from competing with lawyers.[3] To some extent, the

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[1] This letter does not address whether Proposed SCR 23.03 and potential competitive restraints arising from enforcement under it would be immunized from the federal antitrust laws under the state action doctrine.

[2] Proposed SCR 23.01.

[3] Proposed SCR 23.03 would establish the Office of Lawyer Regulation to investigate allegations of unauthorized practice of law. As appropriate, the Office of Lawyer Regulation would enter into consent and desist agreements with those who have engaged in the unauthorized practice of law, seek civil action for violations of consent agreements and injunctive relief against those who have engaged in the unauthorized practice of law, and

petition preserves lawyer/non-lawyer competition by creating exceptions for services that non-lawyers may provide, regardless of whether they fall within the proposed definition.[4] While such exceptions are desirable, they cannot capture every situation where competition from non-lawyers would benefit consumers.

The broad, general definition proposed by the petition therefore would likely force Wisconsinites to hire a lawyer to provide a host of services where legal expertise should not be necessary, such as:

- real estate agents explaining to consumers such things as the (i) ramifications of failing to have the home inspection done on time, (ii) meaning of a mortgage contingency clause, (iii) meaning of an easement, (iv) possible need to lower the price of a home because of an unusually restrictive easement, or (v) requirements for lead, smoke detector, and other inspections imposed by state law;

- tenants' associations informing renters of landlords' and tenants' legal rights and responsibilities, often in the context of resolving a particular landlord-tenant dispute;

- abstractors or title insurance agents, licensed by the State, issuing real estate title opinions and title reports;

- income tax preparers and accountants interpreting federal and state tax codes, family law code, and general partnership laws, and providing advice to their clients that incorporates this legal information;

- financial institutions, investment bankers, securities brokers and other business planners or advisors providing advice to their clients that includes information about various laws;

- lay organizations, advocates, and consumer associations that provide citizens with information about legal rights and issues and help them negotiate solutions to problems; and

- employees or contractors hired by employers who advise the employer about how to handle employment discrimination and sexual harassment issues, and about what must be done to comply with immigration laws, local zoning laws, state labor laws, and safety regulations.

It is conceivable that a broad reading of certain of the exceptions set forth in Proposed SCR 23.02(2) would cover some of the activities in these examples. However, the scope of those exceptions is at best ambiguous,[5] and non-lawyers considering whether to provide such services likely would be deterred by the uncertainty as to whether their conduct would run afoul of the

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monitor compliance with cease and desist agreements and orders of injunction.

[4] *See* Proposed SCR 23.02(2).

[5] For example, although exception (i), which deals with filling in the blanks of legal documents, is useful, it is by no means clear that it would cover activities involving, for example, communication about the meaning of particular language in the forms.

proposed definition.

After providing background information and further explanation of our concerns, we suggest that the proposed definition be limited to services where specialized legal skills are required and an attorney-client relationship is present.

The Interest and Experience of the U.S. Department of Justice

The Justice Department is entrusted with enforcing the federal antitrust laws. We work to promote free and unfettered competition in all sectors of the American economy. The United States Supreme Court has observed that "ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.'"[6] Like all consumers, consumers of professional services benefit from competition,[7] and if competition to provide such services is restrained, consumers may be forced to pay higher prices or accept services of lower quality.

The Justice Department is concerned about efforts across the country to prevent non-lawyers from competing with lawyers through the adoption of excessively broad unauthorized practice of law restrictions by state courts and legislatures. Some of these proposals appear to be little more than overt attempts by lawyers to eliminate competition from alternative, lower-cost non-lawyer service providers, while others appear to be good faith efforts to protect consumers that are not sufficiently narrowly tailored to avoid unnecessary harm to competition. In addressing these concerns, the Justice Department encourages competition through advocacy letters and *amicus curiae* briefs filed with state supreme courts. Through these letters and filings, the Justice Department has urged states, the American Bar Association, and state bar associations to reject or narrow proposed restrictions on competition between lawyers and non-lawyers.[8] In

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[6] *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)); *accord FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990).

[7] *See, e.g., Prof'l Eng'rs*, 435 U.S. at 689; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); *see also United States v. Am. Bar Ass'n*, 934 F. Supp. 435 (D.D.C. 1996), *modified,* 135 F. Supp. 2d 28 (D.D.C. 2001).

[8] *See* letters from the Justice Department and the Federal Trade Commission ("FTC") to the Committee on the Judiciary of the New York State Assembly (June 21, 2006 and April 27, 2007); letter from the Justice Department and the FTC to Executive Director of the Kansas Bar Ass'n (Feb. 4, 2005); letter from the Justice Department and the FTC to Task Force to Define the Practice of Law in Massachusetts, Massachusetts Bar Ass'n (Dec. 16, 2004); letter from the Justice Department and the FTC to Unauthorized Practice of Law Committee, Indiana State Bar Ass'n (Oct. 1, 2003); letter from the Justice Department and the FTC to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003); letters from the Justice Department to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, *et al.* (June 30, 2003 and Mar. 28, 2003); letter from the Justice Department and the FTC to Task Force on the Model Definition of the Practice of Law, American Bar Ass'n (Dec. 20, 2002); letter from the Justice Department and the FTC to Speaker of the Rhode Island House of Representatives, *et al.* (Mar. 29, 2002); letter from the Justice Department and the FTC to President of the North Carolina State Bar (July 11, 2002); letter from the Justice Department and the FTC to Ethics Committee of the North Carolina State Bar (Dec. 14, 2001); letter from the Justice Department to Board of Governors of the Kentucky Bar Ass'n (June 10, 1999 and Sept. 10, 1997); letter from the Justice Department and the FTC to Supreme Court of Virginia (Jan. 3, 1997); letter from the Justice Department and the FTC to Virginia State Bar (Sept. 20, 1996). Brief *Amicus Curiae* of the United States of America and the FTC in *Lorrie McMahon v. Advanced Title Servs. Co. of W. Va.*, No. 31706 (filed May 25, 2004), available at http://www.usdoj.gov/atr/cases/f203700/203790.htm; Brief *Amicus Curiae* of the United States of America and the FTC in On Review of ULP Advisory Opinion 2003-2 (filed July 28, 2003), available at http://www.usdoj.gov/atr/cases/f201100/201197.htm; Brief *Amicus Curiae* of the United States of America in

addition, the Justice Department has obtained injunctions prohibiting bar associations from unreasonably restraining competition by non-lawyers in violation of the antitrust laws.[9] Our comments on the petition are part of our ongoing efforts in this area.

Restrictions on Competition Should Be Closely Examined to Determine Whether They Are in the Public Interest

Restrictions on competition generally are harmful to consumers. Such restrictions are in the public interest only if they are needed to achieve some overriding benefit–such as preventing significant consumer harm from the provision of services by providers who lack the requisite knowledge and training–and are narrowly drawn to minimize their anticompetitive impact.[10] The Justice Department recognizes that there are some services that should be provided only by lawyers because they require legal knowledge and training. For example, only someone who understands law and litigation procedures should represent clients in open court in matters involving their legal rights. Such a requirement protects consumers as well as the court. But consumers also benefit when non-lawyers compete with lawyers to provide many other services that do not require legal training, knowledge or skills.[11] Allowing non-lawyers to provide such services permits consumers to select from a broader range of options, considering for themselves such factors as cost, convenience, and the degree of assurance that the necessary documents and commitments are sufficient. As the United States Supreme Court stated:

> The assumption that competition is the best method of allocating resources in a free

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Support of Movants Kentucky Land Title Ass'n *et al.* in *Ky. Land Title Ass'n v. Ky. Bar Ass'n*, No. 2000-SC-000207-KB (Ky., filed Feb. 29, 2000), available at http://www.usdoj.gov/atr/cases/f4400/4491.htm. The letters to the American Bar Association, Indiana, New York, Rhode Island, Massachusetts, North Carolina, Georgia, Kansas, and Virginia may be found on the Department of Justice's website, http://www.usdoj.gov/atr/public/comments/comments.htm.

[9] In *United States v. Allen County Bar Ass'n,* the Justice Department sued and obtained a judgment against a bar association that had restrained title insurance companies from competing in the business of certifying titles. The bar association had adopted a resolution requiring lawyers' examinations of title abstracts and had induced banks and others to require the lawyers' examinations of their real estate transactions. Civ. No. F-79-0042 (N.D. Ind. 1980). In *United States v. N.Y. County Lawyers Ass'n*, the Justice Department obtained a court order prohibiting a county bar association from restricting the trust and estate services that corporate fiduciaries could provide in competition with lawyers. No. 80 Civ. 6129 (S.D.N.Y. 1981). *See also United States v. County Bar Ass'n*, No. 80-112-S (M.D. Ala. 1980). In addition, the Justice Department has obtained injunctions against other anticompetitive restrictions in professional associations' ethical codes and against other anticompetitive activities by associations of lawyers. *See, e.g., United States v. Am. Bar Ass'n,* 934 F. Supp. 435; *Prof'l Eng'rs,* 435 U.S 679; *United States v. Am. Inst. of Architects*, 1990-2 Trade Cas. (CCH) ¶ 69,256 (D.D.C. 1990); *United States v. Soc'y of Authors' Reps.*, 1982-83 Trade Cas. (CCH) ¶ 65,210 (S.D.N.Y. 1982).

[10] *Cf. FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986) ("Absent some countervailing procompetitive virtue," an impediment to "the ordinary give and take of the marketplace cannot be sustained under the Rule of Reason.") (internal quotations and citations omitted).

[11] "Several jurisdictions recognize that many such [law-related] services can be provided by nonlawyers without significant risk of incompetent service, that actual experience in several states with extensive nonlawyer provision of traditional legal services indicates no significant risk of harm to consumers of such services, that persons in need of legal services may be significantly aided in obtaining assistance at a much lower price than would be entailed by segregating out a portion of a transaction to be handled by a lawyer for a fee, and that many persons can ill afford, and most persons are at least inconvenienced by, the typically higher cost of lawyer services. In addition, traditional common-law and statutory consumer-protection measures offer significant protection to consumers of such nonlawyer services." RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 cmt. c (2000).

> market recognizes that *all elements of a bargain - quality, service, safety, and durability* - and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.[12]

Competition policy calls for any restriction on competition to be justified by a valid need for the restriction, such as the need to protect the public from harm, and for the restriction to be narrowly drawn to minimize its anticompetitive impact.[13] The inquiry into the public interest involves not only an assessment of the harm that consumers may suffer from allowing non-lawyers to perform certain tasks, but also consideration of the benefits that accrue to consumers when lawyers and non-lawyers compete.[14]

Here, based on the complaints submitted with the petition (Exhibit D to the petition), it appears that some Wisconsin customers may have been harmed by non-lawyer service providers. But the proposed definition sweeps too broadly in its effort to remedy those harms by eliminating lawyer/non-lawyer competition for many services where there is no evidence that customers have been harmed.[15] Academic research indicates that consumers likely face little risk of harm from non-lawyer competition in many areas. For example, studies of lay specialists who provide bankruptcy and administrative agency hearing representation find that they perform as well as or better than lawyers.[16] Similarly, a study comparing five states where lay providers examined title evidence, drafted instruments, and facilitated the closing of real estate transactions with five states that prohibited lay provision of such services found "[t]he only clear conclusion . . . is that the evidence does not substantiate the claim that the public bears a sufficient risk from lay provision of real estate settlement services to warrant blanket prohibition of those services under the auspices of preventing the unauthorized practice of law."[17]

If non-lawyers were barred from providing the services encompassed by the proposed definition, fees for those services likely would rise as alternative, lower-cost lay service providers would no longer be able to restrain the fees that lawyers can charge. Consumers who otherwise would receive assistance from non-lawyer service providers–real estate agents, tenants'

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[12] *Prof'l Eng'rs*, 435 U.S. at 695 (emphasis added); *accord*, *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 423.

[13] *Cf. FTC. v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986) ("Absent some countervailing procompetitive virtue," an impediment to "the ordinary give and take of the market place . . . cannot be sustained under the Rule of Reason.") (internal quotations and citations omitted).

[14] *See Prof'l Eng'rs*, 435 U.S. at 689; *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787 (1975). *See also In re Opinion No. 26 of the Comm. on Unauthorized Practice of Law*, 654 A.2d 1344, 1345-46 (N.J. 1995) (lawyer/non-lawyer competition benefits the public interest).

[15] Perhaps most significant, a 1999 survey found that in most states complaints about the unauthorized practice of law did not come from consumers, the potential victims of such conduct, but from attorneys, who did not allege any claims of specific injury. Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 Geo. J. Legal Ethics 369, 407-08 (2004).

[16] Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 Geo. J. Legal Ethics 369, 407-08 (2004). *See also* Herbert M. Kritzer, Legal Advocacy: Lawyers and Non Lawyers at Work 50-51 (1998) (finding that in unemployment compensation appeals before the Wisconsin Labor and Industry Review Commission, "[t]he overall pattern does not show any clear differences between the success of lawyers and agents").

[17] Joyce Palomar, *The War Between Attorneys and Lay Conveyancers – Empirical Evidence Says "Cease Fire!"*, 31 CONN. L. REV. 423, 520 (1999).

associations, financial institutions, and others–would be forced to choose between hiring a lawyer and going without assistance altogether. The potential harm from increasing the cost for these services may extend to consumers not seeking assistance of any kind. A 1996 ABA task force survey concluded that low income and middle-income households were underserved by the legal system, with cost being a major reason why these groups avoided the legal system.[18]

Even Wisconsinites who would choose a lawyer over a lay service provider likely will pay higher prices if the proposed definition is adopted. Evidence gathered in a New Jersey Supreme Court proceeding indicated that, in communities in New Jersey where non-lawyers frequently competed with lawyers to close real estate transactions, buyers represented by counsel paid on average $350 less for closings, and sellers represented by counsel paid $400 less, than in the New Jersey communities where lay closings were not prevalent.[19] Likewise, the Kentucky Supreme Court concluded that prices for real estate closings by lawyers dropped substantially–by as much as 1% of the loan amount plus fees–as a result of competition from lay title companies, explaining that the lay competitors' presence "encourages attorneys to work more cost-effectively."[20] And, in Virginia, where the legislature passed a law upholding the right of consumers to continue using lay closing services, proponents of lay competition presented survey evidence suggesting that lay closings in Virginia cost on average $150 less than lawyer closings.[21]

Restrictions on Lawyer/Non-Lawyer Competition Should Be Limited to Services Provided Pursuant to an Attorney-Client Relationship

The proposed definition appears to be overbroad because it would bar non-lawyers from providing services in many instances where it is apparent that specialized legal skills are not required. In instances where specialized legal skills are required, an attorney-client relationship generally will exist. To preserve competition, and to benefit consumers, the Court should consider adopting language similar to that found in Rule 49 of the District of Columbia Court of Appeals. Rule 49 defines the practice of law as "the provision of professional legal advice or services *where there is a client relationship of trust or reliance*."[22] The Commentary to Rule 49 makes clear that giving advice or counsel to others as to legal rights or responsibilities is not necessarily the practice of law. Rather, such services may be the practice of law *if* they are provided in the context of an attorney-client relationship. The Commentary explains:

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[18] AM. BAR ASS'N FUND FOR JUSTICE & ED., LEGAL NEEDS & CIVIL JUSTICE: A SURVEY OF AMERICANS (1996). The most common legal needs reported by respondents were related to personal finances, consumer issues, and housing. For low- and middle-income households, the most common response to a legal problem was "handling the situation on their own." For low-income households, the second most common response was to take no action at all. The second-most common response for middle-income households was to use the legal system, including contacts with lawyers, mediators, arbitrators, or official hearing bodies.

[19] *See In re Opinion No. 26*, 654 A.2d at 1348-49.

[20] *See, e.g., Countrywide Home Loans, Inc. v. Ky. Bar Ass'n*, 113 S.W.3d 105, 120 (Ky. 2003) ("before title companies emerged on the scene, [the Kentucky Bar Association's] members' rates for such services were significantly higher").

[21] *See* letters to the Virginia Supreme Court and Virginia State Bar, supra n.8.

[22] D.C. Court of Appeals Rule 49(b)(2) (2004) (outline letters omitted) (emphasis added).

> As originally stated in sections (b)(2) and (3) of the prior Rule, the "practice of law" was broadly defined, embracing every activity in which a person provides services to another relating to legal rights. This approach has been refined, in recognition that there are some legitimate activities of non-Bar members that may fall within an unqualifiedly broad definition of the law. The definition set forth in section (b)(2) is designed to focus first on the two essential elements of the practice of law: The provision of legal advice or services, and a client relationship of trust or reliance. . . . The presumption that one's engagement in one of the enumerated activities is the "practice of law" may be rebutted by showing that there is no client relationship of trust or reliance, or that there is no explicit or implicit representation of authority or competence to practice law, or that both are absent. . . . [T]he Rule is not intended to cover conduct which lacks the essential features of an attorney-client relationship. . . . Tax accountants, real estate agents, title company attorneys, securities advisors, pension consultants, and the like, who do not indicate they are providing legal advice or services based on competence and standing in the law are not engaged in the practice of law, because their relationship with the customer is not based on a reasonable expectation that learned and authorized professional legal advice is being given. Nor is it the practice of law under the Rule for a person to draft an agreement or resolve a controversy in a business context, where there is no reasonable expectation that she is acting as a qualified or authorized attorney. . . .[23]

Adding the requirement of an attorney-client relationship and similar commentary to the proposed definition would protect consumers from harm caused by persons engaged in the unauthorized practice of law, while also preserving lawyer/non-lawyer competition that benefits consumers.

Our suggestion to revise the petition does not disregard the State Bar's concerns. The State Bar's examples of the unauthorized practice of law, such as non-lawyers portraying themselves as "notarios," are situations where non-lawyers have held themselves out as lawyers or created the impression that they had authority or competence to practice law.[24] In these situations, a relationship of trust or reliance likely existed. Revising the definition as we propose would bar such conduct. If the State Bar is concerned that consumers may not always know that the special skills of a lawyer are required for a particular task, and thus might unknowingly rely on non-lawyers for services that require legal skills, a notice requirement applicable to the particular settings in which the concern arises could be established. For example, the New Jersey Supreme Court addressed concerns about non-lawyer provision of services at real estate closings not by banning non-lawyer closing services but by requiring merely that consumers be provided a written notice explaining the risks involved in proceeding in a real estate transaction without a lawyer.[25] This type of disclosure requirement applicable to specified areas of commerce would permit consumers to make an informed choice about whether to use non-lawyer service providers.

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[23] *Id.* Commentary on Rule 49(b)(2).

[24] *See* Petition for Supreme Court Rule at 4-5.

[25] *In re Opinion No. 26*, 654 A.2d at 1363.

Conclusion

The choice of whether to use a lawyer or non-lawyer service provider should rest with the consumer unless it is clear that specialized legal skills or training are required. Lawyer/non-lawyer competition benefits consumers, particularly when there is no evidence that consumers have been harmed by non-lawyer service providers. We urge the Court to revise the proposed definition to preserve competition in service areas for which the knowledge and skill of a lawyer is not required.

The Justice Department thanks you for this opportunity to present our views. We would be pleased to address any questions or comments regarding this letter.

Yours sincerely,

Thomas O. Barnett